

REMARKS

Claims 1-19, 21-25, 27-31 and 34-38 are pending in this application. Claims 2, 3, 8, 9 and 17 are withdrawn. By this Amendment, claims 1, 29 and 30 are amended. Support for the changes to claims 1, 29 and 30 may be found, for example, in paragraphs [0054], [0055] and [0061] and Fig. 3.

Claims 1, 4-7, 10-16, 18-28 and 29-36 stand rejected under 35 U.S.C. §103(a) over Buckley et al., U.S. Patent No. 4,219,283 in view of Drozd, Jr., U.S. Patent No. 4,489,843.

Claims 1, 4-7, 10-16, 18-36 stand rejected under 35 U.S.C. §103(a) over Buckley in view of Yasada, U.S. Patent No. 4,592,476. These rejections are respectfully traversed.

Claims 20, 26, 32 and 33 were previously canceled. Thus, the rejection of these claims is moot. Claim 1 recites an applicator comprising a fixed-length stem. The combination of Buckley and Drozd or Yasada fails to teach or suggest either an applicator step or applicator element that has a fixed length.

More particularly, the primary reference Buckley is directed to containers with a closure that includes an extendible dispensing member that is enclosed within the container when the closure is secured in a closed position on the container. The extendible dispensing member is able to reach substantially all portions of the interior of the container when the closure is removed. Neither Drozd nor Yasada teaches or suggests any type of applicator stem or applicator element as these references are directed only to containers having "tamper-evident" or "pilferproof" closures, respectively.

In view of the above, the combinations of Buckley/Drozd and Buckley/Yasada fail to teach or suggest all features of claim 1, as well as the claims depending therefrom. Accordingly, withdrawal of the 35 U.S.C. §103(a) rejections based upon these applied references is respectfully requested.

Claims 37-38 stand rejected under 35 U.S.C. §103(a) over Gueret, U.S. Patent No. 6,257,788 (Gueret '788) in view of Drozd or Yasada.¹ This rejection is respectfully traversed.

Claim 37 recites, in pertinent part, a device comprising a flask having a flask body having height ... the flask containing a substance for application to nails ... an applicator element having a length ... wherein the length of the applicator element is equal to the height of the flask body to within about 30 %.

Claim 38 recites, in pertinent part, a device comprising a flask comprising a threaded neck having a length, the flask containing a substance for application to nails ... an applicator comprising a stem having a length ... wherein the length of the stem is equal to the length of the neck to within about 30 %.

The Office Action asserts that "viewing Figure 1, the length of the applicator element is considered to be 'equal to the height of the flask body to within about 30%' and the length of the stem is considered to be 'equal to the length of the neck to within about 30%.'" (Emphasis added; *see* Office Action, page 7.) As explained in the MPEP § 2125, "[I]t is well established that patent drawings do not define the precise proportions of the elements and may not be relied on to show particular sizes if the specification is completely silent on the issue," citing *Hockerson-Halberstadt, Inc v. Avia Group Int'l*, 222 F.3d 951, 956, 55 USPQ2d 1487, 1491 (Fed. Cir. 2000) (the disclosure gave no indication that the drawings were drawn to scale). Therefore, because the specification of Gueret '788 does not specifically state that the drawings provided in this patent are drawn to scale, it is improper to assert that length of applicator element is within 30% of the height of the flask body, as recited in claim 37.

¹ On page 7 of the Office Action, both Drozd and Yasuda are referenced as a secondary reference.

Similarly, it is improper to assert that the length of the applicator stem is within 30% of the length of the neck, as recited in claim 38.

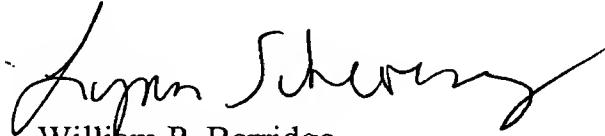
As further described in MPEP § 2125, "the description of the article pictured can be relied on, in combination with the drawings, for what they would reasonably teach one of ordinary skill in the art", citing *In re Wright*, 569 F.2d 1124, 193 USPQ 332 (CCPA 1977). In *Wright*, it was permissible for the Patent Office to rely on the teachings of a reference to suggest the desirability of an increased length of a chime (i.e., a component of a barrel), but not to show that the length of the chime was roughly $\frac{1}{2}$ to 1 inch for a whiskey barrel. Therefore, with respect to applying Gueret '788 in the present application, it may be proper to draw generalized conclusions about the relative measurements of the applicator stem or applicator element to the neck or body of the flask, but certainly not to teach or suggest specific relative percentage values of the measurement of one feature with respect to the measurement of another feature. Nonetheless, even if so attempted, it would not be possible to obtain the claimed proportions based on the figures of Gueret.

In view of the above, Gueret '788 does not teach or suggest all features of claims 37 or 38 and the secondary references do not correct this deficiency. Accordingly a *prima facie* case of obviousness has not been made based on Gueret '788 and Drozd or Yasada. Withdrawal of the 35 U.S.C. §103(a) rejection of claims 37 and 38 is respectfully requested.

In view of the foregoing, it is respectfully submitted that this application is in condition for allowance. Favorable reconsideration and prompt allowance are earnestly solicited.

Should the Examiner believe that anything further would be desirable in order to place this application in even better condition for allowance, the Examiner is invited to contact the undersigned at the telephone number set forth below.

Respectfully submitted,



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Attachments:

Petition for Extension of Time
Request for Continued Examination

Date: October 22, 2007

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